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MEMO

TO: Crook County Court

FROM: John Eisler, Asst. County Counsel

DATE: August 11, 2022

RE: Staff Report for 217-21-000321-PLNG
Our File No.: Comm. Dev. 63

The Planning Commission held a public hearing on March 17, 2021, and met again for deliberation only regarding a modification request of a conditional use permit for the TSR North Solar Facility. The original CUP was for a 320-acre facility. The modification sought to expand the facility to approximately 585 acres. The Planning Commission approved the application via a written decision on April 12, 2021.

The Oregon Department of Fish and Wildlife (“ODFW” or the “Appellant”) timely appealed the permit approval on April 26, 2021. This appeal hearing was originally scheduled for June 22, 2021. Because of related litigation ongoing at LUBA and the Oregon Court of Appeals, at the request of the Applicant and with the consent of the Appellant, the County Court has continued the hearing multiple times until the current date of August 17, 2022.

I. BACKGROUND

The Applicant, TSR North Solar Farm LLC, requested approval to modify an existing conditional use permit (217-19-000378-PLNG) for a commercial photovoltaic facility on up to 320 acres in the County’s EFU-3 zone (Exclusive Farm Use – Powell Butte Area). The Subject Property is located on 1515 tax lot 1223, owned by Ronald Raasch. The modification application requested an expansion of the facility and associated transmission lines of up to 654 acres. With the expansion, the 585-acre Subject Property now includes approximately 220 acres of mapped pronghorn winter range and is within a big game movement corridor.

Based on the staff report, application materials, findings, facts and testimony in the record, the Planning Commission voted to approve the modification application by a vote of 5 to 1. The Oregon Department of Fish and Wildlife (ODFW), represented by Greg Jackle, appealed the Planning Commission’s approval

because the findings and evidence on which the approval is based are insufficient to demonstrate or ensure compliance with ORS 215.446 (HB 2329 (2019)) and OAR Chapter 635, Division 415, which implements ORS 496.012. ODFW

detailed the inadequacies of the Applicant’s habitat assessment and proposed mitigation plan in its letters to the Crook County Planning Commission dated December 16[, 2020] and February 24, 2021 and resubmit those letters with this petition.

Though the basis for appeal was stated as above, included with the appeal, though not referenced on the appeal application, is an April 26, 2021 letter from Greg Jackle on behalf of ODFW, the purpose of which “is to provide ... formal comments and rationale for appealing” the Planning Commission’s decision and “to provide ODFW’s recommendations to the County Court for its decision in this matter.”

Because of the stated purpose of the April 26 letter and because many of ODFW’s previous recommendations and concerns in the December 16 and February 24 letters were later addressed in a subsequent version of the mitigation plan and the Planning Commission’s decision, I interpret the grounds for appeal to be limited to the statements in the April 26 letter. This staff report is based on that interpretation. I suggest the County Court seek to clarify ODFW’s intent for this appeal, on the record, to ensure the scope of this appeal hearing covers all issues still in contention. As such, the April 26, 2021 letter is confined to recommended modifications to the Planning Commission’s Condition of Approval #20, which adds various requirements to the Applicant’s wildlife mitigation plan Option 1.¹

II. PROCESS ON APPEAL

The County’s appeal procedures are found in CCC 18.172.110. The Appeal was timely received and complete. Notice was timely published multiple times, the last being on May 6, 2022. The Appellant provided a copy of the transcript on April 20, 2021.

The County Court’s hearing of this appeal is an “on the record review,” to be based on the record made before the Planning Commission, unless the County Court elects, by motion, to supplement the record. The burden remains with the applicant to demonstrate that relevant criteria were met and why the initial decision is in error.

At the conclusion of this hearing, the County Court may affirm, overrule, or modify the Planning Commission’s decision and shall set forth findings showing compliance with applicable standards and criteria. The County Court may also remand the Application back to the Planning Commission with instructions to consider additional facts, issues, or criteria not previously addressed.

III. ADDRESSING THE APPEAL

The request to expand the facility through this modification triggered the requirements of 2019’s HB 2329, partially codified at ORS 215.446. One aspect of ORS 215.446, at (3)(a)(C), is that the mitigation plan must be consistent with ODFW’s mitigation policy at OAR 635-415 (the “Mitigation Policy”). We now have some clarity on how that provision is to be interpreted from both LUBA and the Court of Appeals. I will address my understanding of those requirements as I address each section of ODFW’s requested revisions to Condition 20.

¹ The April 26, 2021 letter offered only support for Option 2, the payment-in-lieu of mitigation option.

Condition 20 states “The Applicant shall conduct mitigation for impacts to the Project site as follows” and addresses migratory birds and Option 1’s juniper removal plan. Regarding Option 1, Condition 20 has various requirements regarding timing, location, scale, maintenance, durability, and monitoring.

A. Location

Condition 20 requires the location of the mitigation site to be “located within big game winter range identified on ODFW’s maps within Crook County.” ODFW has requested the location of the mitigation site be located within *pronghorn* winter range identified on ODFW’s maps within Crook County.

Staff Response:

The Mitigation Policy’s locational requirements depend on the Habitat Category of the site. Here, the Subject Property is *not* within Crook County’s Goal 5 inventory of big game winter range. However, 220 acres (out of the 585-acre total) are mapped as pronghorn antelope winter range. The parties agreed to classify the 220-acre portion as Habitat Category 2 (HC2) and the remaining portion of the subject property as Habitat Category 4 (HC4).

The requirements for HC2 and HC4 are different. HC2 requires a mitigation site “in-kind” and “in-proximity”; HC4 can be either in-kind or out-of-kind and in-proximity or out-of-proximity. The definitions for each, from OAR 635-415-0005 are as follows:

- “in-kind” means habitat mitigation measures which recreate similar habitat structure and function to that existing prior to the development action;
- “out-of-kind” means habitat mitigation measures which result in different habitat structure and function that may benefit fish and wildlife species other than those existing at the site prior to the development action;
- “in-proximity” means habitat mitigation measures undertaken within or in proximity to areas affected by a development action. For the purposes of this policy, “in proximity to” means within the same home range, or watershed (depending on the species or population being considered) whichever will have the highest likelihood of benefiting fish and wildlife populations directly affected by the development; and
- “out-of-proximity” means habitat mitigation measures undertaken outside the area that would constitute “in-proximity mitigation” but within the same physiographic province as the development action.

Thus, under the Mitigation Policy, over 1/3 of the Subject Property (the HC2 portion) should be mitigated for by a site with stricter requirements than the remaining portion. Under the stricter HC2 standards, the mitigation site should be in a location that can recreate a similar habitat structure and function to what exists at the Subject Property prior to development (in-kind). The mitigation site should also be within the same home range or watershed as the Subject Property, depending upon which will have the highest likelihood of benefiting pronghorn and big game (in-proximity). Conversely, the HC4 portion, under the Mitigation Policy, could also utilize a different mitigation site that results in a different habitat function and structure from the Subject Property (out-of-kind) and merely be within the same physiographic province (out-of-proximity).

Absent a suggestion to segregate the mitigation into two separate projects, one would think this situation could be addressed in two different ways: (1) setting the HC2 standards as the baseline for the entire mitigation project or (2) blending the two standards in some proportional fashion (i.e., 1/3 vs 2/3) to land on an appropriate locational requirement for a single site.

The Planning Commission required the mitigation site be in Crook County, within mapped big game winter range currently identified on ODFW's maps, and on "sagebrush and/or bitterbrush dominant" habitat (or habitat that could be restored to be so), satisfying both the "in-kind" and "home range" requirements. ODFW counters in its April 26 letter that "the mitigation site needs to benefit pronghorn and thus [be] within mapped pronghorn habitat in Crook County."

Assuming, for the sake of argument, that the proper approach is to set the HC2 standards as the baseline for the entire mitigation project (as discussed above), ODFW's recommendation may be more than the law requires. A sagebrush/bitterbrush dominant site would, based on the evidence in the record, recreate a similar habitat function and structure, satisfying the "in-kind" requirement. Furthermore, the "in-proximity" requirement is not that the mitigation site be within the same "winter range" as the affected species, but the same "home range." Home range is defined in the Mitigation Policy to mean "the area that a species traverses in the scope of normal life-cycle activities." OAR 635-415-0005(9). I am unsure if there is specific evidence in the record concerning the entire scope of normal life-cycle activities for pronghorn and if those activities traverse what is currently mapped as big game winter range within Crook County.

Assuming instead, for the sake of argument, that the proper approach is to blend the standards such that the single mitigation site is a rough approximation of the locational requirements for a site that is 1/3 HC2 and 2/3 HC4, there should be no question that the pronghorn's physiographic province fully encompasses what is mapped by ODFW as big game winter range in Crook County.

B. Timing

The Planning Commission required the Applicant to provide the County "with additional documentation of the final implementation plan for the selected [mitigation] option before conducting site clearing or grading." ODFW recommends adding a timing component to Condition 20, which would read: "Mitigation shall be implemented and completed either prior to concurrent with development impacts." ODFW argues that without that requirement, development could precede the benefits of the completed mitigation site, thus failing to properly offset the loss in habitat quality and quantity.

Staff Response

For both Habitat Categories 2 and 4, the Mitigation Policy states that "The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action." OAR 635-415-0025(2)(b)(B) & (4)(b)(B). The Planning Commission's requirement that the mitigation's final implementation plan be delivered to the County before site clearing and grading does not provide an assurance that such plan will be actually implemented prior to or concurrently with the development action. Condition 20 should be amended to include this requirement.

C. Scale

These mitigation plans often use a ratio to describe the scale of mitigation measures—*i.e.*, a 1 to 1 ratio would mean that there would be an equal amount of acreage available for mitigation as the Subject Property impacted; a 2 to 1 ratio would mean that two acres would need to be offset for each acre impacted. The Planning Commission set the ratio for that 220-acre portion of the Subject Property within ODFW’s pronghorn winter range identified as Habitat Category 2 as a 1.5 to 1 ratio.² The Planning Commission observed prior pronghorn winter range ratios approved at the Tango, Millican, and Crook Flat projects were between 1.5 to 1 and 2 to 1.

ODFW recommends the HC 2 portion be mitigated at a 2 to 1 ratio instead of 1.5 to 1. ODFW states that a 2 to 1 ratio meets the standard of no net loss and a net benefit of habitat quality and quantity. ODFW further states that these “habitats are limited on the landscape” and the development of multiple solar projects in the area has resulted in a “rapid accumulation of impacts” to pronghorn habitat.

Staff Response

The Mitigation Policy for HC 2 has a goal of “no net loss of either pre-development habitat quantity or quality. In addition, a net benefit of habitat quantity or quality must be provided.” OAR 635-415-0025(2)(b)(B). “Net benefit” means “an increase in overall in-proximity habitat quality or quantity after a development action and any subsequent mitigation measures have been completed and monitored.”

Successfully mitigating 1.5 acres for each 1 acre developed should increase overall in-proximity habitat quantity by 50%, thus providing a net benefit. While a 2 to 1 ratio would result in a greater net benefit, such a ratio is more than the law requires. Moreover, I do not see a basis in the Mitigation Policy to apply and enforce the cumulative effects of neighboring developments on an individual application.

D. Maintenance and Monitoring

Condition 20 requires the Applicant, under Option 1, to “revisit and conduct additional juniper removal as needed in consecutive intervals of 12 years following the initial treatment or to the standard specified by the U.S. Department of Agriculture’s Natural Resources Conservation Service, whichever is shorter.” ODFW recommends inserting an additional sentence: “Noxious weed monitoring and treatment shall also be maintained on a biennial basis.” ODFW states this addition will “assure the mitigation site is still functioning wildlife habitat and not degraded due to invasion of annual grasses after the juniper treatment has occurred.”

Staff Response

ODFW’s recommendation involves preserving the “habitat quality,” defined as “the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it.” I did not locate any evidence in the record specifically addressing whether biennial weed treatment and monitoring will influence pronghorn presence and life-cycle requirements. I would ask the parties to identify any

² The Planning Commission required the remaining, HC 4 portion to be mitigated at a 1 to 1 ratio.

such evidence in the record to determine whether ODFW's recommendation would be required to meet the applicable legal standard.

E. Durability

Condition 20 has a durability requirement as follows:

Before site clearing or grading at the TSR North site, the Applicant shall provide Crook County Community Development with a fully executed instrument preventing development on the mitigation site for at least the duration of the Project, including but not limited to a working lands agreement, a deed or outright purchase agreement, or a conservation easement.

ODFW recommends adding a restriction to "uses conflicting with habitat function," including "(i) grazing above levels approved under existing grazing management plans unless otherwise approved in writing by ODFW; (ii) all nonagricultural uses unless agreed to by ODFW; (iii) grading, mowing, blading, or expansion of impervious surfaces or access road networks, and (iv) divisions of the mitigation site." ODFW also recommends clarifying that the duration of the Project means from construction through site reclamation.

Staff Response

First, regarding the duration of the Project, the Mitigation Policy at 635-415-0020(8)(g) requires that the mitigation "[b]e effective throughout the project life or the duration of project impacts whichever is greater." However, the Court of Appeals ruled that counties need not require the information within 635-415-0020(8). *Dep't of Fish and Wildlife v. Crook County*, 315 Or App 625, 643 (2021). Still, other areas of the Mitigation Policy for which the County must find the mitigation plan is consistent with define mitigation as being effective "during the life of the development action." 635-415-0005(16)(d). "Development action" is defined to mean, *inter alia*, as the period of time over which the County has regulatory authority over the project. The County has such authority until decommissioning is complete. This also makes intuitive sense, as the Subject Property will remain impacted by the development until decommissioning is complete. Thus no-net loss would require an available mitigation site until the Subject Property is once again suitable habitat for the wildlife of concern. I also believe this was the original intent of this section of Condition 20, however I see no harm in clarifying that point.

Moving to ODFW's recommendation to restrict "conflicting uses," this argument again speaks to habitat quality, as discussed above. The legal requirement is that the mitigation site approximate "the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it." To resolve this issue, I would ask the parties to identify evidence in the record both evaluating which, if any, current "conflicting uses" have or could take place on the Subject Property and how such activities could be or are detrimental to pronghorn's species presence and life-cycle requirements.

Please let me know if you have any questions.